HOGAN & HARTSON
L.L.P.

DAVID L. SIERADZKI
PARTNER
(202) 637-6462
DLSIERADZKI@HHLAW.COM

COLUMBIA SQUARE
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910
WWW.HHLAW.COM

February 7, 2005

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

Re: Federal-State Joint Board on Universal Service, CC Docket No. 96-45

Dear Ms. Dortch:

On behalf of Western Wireless Corp. ("Western Wireless"), Mark Rubin of Western Wireless and I made an *ex parte* presentation today to Jessica Rosenworcel, legal advisor to Commissioner Copps. The presentation covered the points on the attached handout.

If you have any questions, please contact me.

Respectfully submitted,

David L. Sieradzki
Counsel for Western Wireless Corp.

Enclosure

cc: Jessica.Rosenworcel

Competitively Neutral Guidelines for ETC Designation

Western Wireless Corp.

CC Docket No. 96-45

February 2005

Goals of Universal Service Policy

- Promote the interests of *consumers* – not carriers.
  - Promote deployment of telecommunications facilities and services to rural areas.
  - Ensure that rural consumers have access to affordable services comparable to those available in urban areas.
  - Establish a level playing field to facilitate facilities-based inter-modal competition, if economically warranted.
- Control growth of the high-cost fund –
  - In a competitively and technologically neutral manner.

Universal Service Support for Wireless Benefits Rural Consumers

- Consumers in rural, as well as urban, areas are increasingly choosing to rely more heavily on wireless telecommunications.
- Universal service support enables wireless ETCs to deploy more facilities, fill in coverage gaps, and improve service quality.
- Wireless ETCs have used USF support to dramatically increase telecom penetration in underserved rural areas such as Indian reservations.
- More robust wireless coverage stimulates economic development in rural areas.

Western Wireless' Experience Proves that Wireless USF Support Benefits Consumers

- We are using support funds to bring wireless coverage to remote rural areas that previously had inadequate coverage or no telecom service at all.
  - Examples: Pine Ridge Reservation, South Dakota; Reese and Antelope Valleys, Nevada; Parker, South Dakota (see 1/20/05 USA Today article)
- We are spending substantially more on improving and expanding our rural wireless network in states where we are receiving USF, such as North Dakota and South Dakota, than in states where we are not, such as Montana.
  - Forward-thinking state commissions recognize the value of financing rural wireless build-out to improve coverage in sparsely populated areas.
  - Example: North Dakota PSC's "Zap the Gap" initiative.

The FCC Has Successfully Achieved Its Objectives on ETC Designation

- The two most critical tasks on USF have been: (1) controlling high-cost fund growth, and (2) striking an appropriate balance between enabling facilities-based competition in rural areas and ensuring accountability in the use of funding.
  - The first of these goals remains critical – but must be addressed in a balanced and comprehensive way, primarily in the *Rural Basis of Support* proceeding.
  - The FCC can justifiably take pride in having successfully achieved the second of these goals with the careful balance it struck in *Virginia Cellular* and *Highland Cellular*.
    - These precedents have governed FCC ETC designations and have been highly influential with state commissions. By now, the intensive process of designating wireless carriers over the past two years is nearly concluded.

The Need to Control Funding Growth

- Policy changes are needed to bring fund growth under control.
  - However, both the law and sensible public policy require this to be done in a competitively neutral manner.
  - Anti-competitive restrictions applied only to CETCs are not competitively neutral and violate the Act and court of appeals decisions.
  - Worst of all, such restrictions harm rural consumers.
- Wireless CETCs are <u>*not*</u> the major cause of funding growth.
  - Over the past five years, the amount of *increased* high-cost funds to wireline carriers was ten times the total amount of funds to wireless CETCs.
  - Rate of CETC fund growth is likely to slow down, now that a number major wireless carriers have received designation in the past two years.
  - Even if funding to wireless carriers were eliminated, the contribution factor would still be over 10 percent.

Competitively Neutral Ways to Control Funding Growth

- Short-term option:
  - Impose caps on increases in per-line funding to all ETCs (ILECs and CETCs) in study areas with competition.
    - Repeatedly recommended by Joint Board (*see* RD, ¶¶ 77-80).
    - Permissible pursuant to Appropriations Act.
- Long-term options:
  - Consider in the pending *Rural Basis-of-Support* proceeding.

ETC Criteria Must Be Competitively Neutral

- The competitive neutrality principle, which courts have found is dictated by Section 254 of the Act, requires that the same requirements and procedures apply to both incumbent and competitive ETCs.
  - Any new reporting or certification requirements must apply equally to ILECs and CETCs.
- Neither incumbent nor competitive carriers that have already received ETC designation should be required to demonstrate compliance with new requirements.
  - Would be an unfair form of "retroactive rulemaking."

The FCC Should Adopt the Approach Recommended by the Joint Board

- The FCC should follow the Joint Board’s recommended approach to ETC designation: adopt a non-binding menu of guidelines among which states (and the FCC) may select when designating ETCs.
  - The criteria specified in the Act and in the FCC’s rules ***<u>must</u>*** be used.
  - Certain ETC criteria and public interest standards ***<u>may</u>*** be used.
  - Certain other criteria and public interest standards ***<u>must not</u>*** be used.
    - To impose “such onerous eligibility requirements that [in effect] no otherwise eligible carrier could receive designation” would violate Section 214(e)(2). *Texas OPUC v. FCC*, 183 F.3d 393, 418 n.31 (5th Cir. 1999).
    - Certain other criteria would violate Sections 332(c)(3) and (8) if applied to wireless carriers.

ETC Criteria That States (and the FCC) *Must* Use

- Carrier must demonstrate the "capability and commitment" to provide the nine services and functionalities included in the "definition of universal service."
- Carrier uses its own facilities (or a combination of its own facilities and resale).
- Enforceable and auditable commitment to utilize all support funds for the provision, maintenance, and upgrading of supported facilities and services.

ETC Criteria that States (and the FCC) *May* Use

- The states *may* use some (not necessarily all) of the following:
  - Baseline consumer protection requirements, such as the CTIA Consumer Code.
  - Demonstration regarding planned network build-outs in the designated service area (*e.g.*, *Virginia Cellular Order*).
  - Carrier will consider various measures to extend service to all customer locations in the designated service area, and file reports if unable to do so (*e.g.*, *Virginia Cellular Order*).
  - Ability to keep one's own network functional in emergencies (to the extent within carrier's control).
  - Adequate financial resources.
  - Equal access *only* if other ETCs in the area relinquish designations.

ETC Criteria That States (and the FCC) *Must Not* Use

- Equal access requirements on wireless carriers – unnecessary, anti-competitive, and violate Section 332(c)(8) of the Act.
- Specific pricing requirements (e.g., specific number of free local minutes in rate plans) – violate Section 332(c)(3).
- Application of ILEC/monopoly-oriented rules regarding "carrier of last resort," consumer protection, or service quality – impede competition by imposing unnecessary burdens on carriers with no market power.
- Quantified "cost-benefit" analyses that ignore or understate the benefits of wireless deployment and competition.

ETC Criteria That States (and the FCC) *Must Not* Use – continued

- The amount of support per line that the ILEC is receiving under the current rules is irrelevant to the public interest test for ETC designation.
  - The amounts of support received by ILECs and CETCs should be addressed in the *Rural Basis-Of-Support* proceeding – not here.
  - Ultimately, the amounts of ILEC and CETC support should be “right-sized,” and should neither artificially promote entry nor artificially discourage entry.
- Applicants must not be required to pass a “rural public interest test” to qualify for ETC status in *non-rural* ILEC areas.

Redefinition of Rural ILEC Study Areas Must Be Permitted Where Appropriate

- Antiquated, gerrymandered rural ILEC study area boundaries must not be used to pose barriers to entry.
  - No serious intent to engage in “cream-skimming” has ever been demonstrated.
  - “Cream-skimming” can be prevented by disaggregating and targeting support in a cost-based manner.
  - Reverse *Virginia Cellular* precedent: Where CMRS carriers cannot serve portions of rural study areas due to license limitations, they should receive designation in the areas that they <u>*can*</u> serve.

Clean Up the Implementing Rules

- Support should be available once carriers receive ETC designation.
  - Carriers, not states, should file any necessary certifications.
  - Filing delays should not deprive carriers of funding or necessitate burdensome waivers.
- Wireless carriers should be permitted to use "place of primary use" from Mobile Sourcing Act, rather than billing address, to determine customer locations for USF support purposes.

Rural phone service fund under siege

Share for wireless carriers protested

By Paul Davidson
USA TODAY

Paul Reynolds was in cellphone Siberia. His cellphone worked fine in Sioux Falls, S.D., where he worked. But it was useless in his tiny hometown of Parker, 25 miles southwest.

Telecom

Neither of the state's two main carriers — Western Wireless, Reynolds' provider, and Verizon Wireless — felt it would be profitable to build a cell tower in Parker, a farming town with 1,031 people.

So Reynolds, a building contractor who's on the phone constantly with subcontractors and customers, saw his workday routinely end 20 minutes or so earlier than he wished because his cellphone would go dead on the drive home.

Salvation came a year ago. That's when Western Wireless, bowing to pleas from community leaders and state regulators, completed a 265-foot, $245,000 tower just west of Parker.

But now, the money that helped pay for the tower — from the federal universal service fund — is under siege from critics who say it amounts to an unwarranted windfall for wireless companies.

The $3.5 billion fund, financed by a 10.7% fee on every long-distance bill, goes mostly to rural phone incumbents to keep basic home service affordable. That's because it's costly for companies to string wires to rural areas with few customers.

But to spur competition, the 1996 Telecommunications Act also lets the incumbents' rivals — most of which are wireless carriers — receive some of the money if state or federal officials find it's in the public interest. The sum received by wireless providers soared to about $230 million last year, from $2.6 million in 2000, the Federal Communications Commission says.

Rural phone companies complain that those payments are unnecessary and a big reason the fund is under strain. The FCC is listening. It's set to rule next month on a proposal that could sharply cut universal-service funding for wireless providers.

"If it's uneconomical to provide (wire-line) service to an area, we shouldn't be (enticing) a competitor to (serve) the same area," says Legg Mason analyst Chris King.

Wireless carriers counter that the subsidies help serve the small towns that have few or no cellphone providers — and some back-country pockets that lack even basic wire-line service. The wireless companies note that they receive just 7% of the funding.

"We're talking about a bunch of carriers that just don't like competition," says CEO Jack Rooney of U.S. Cellular, one of the rural wireless carriers that get funding.

Reynolds, the building contractor, appreciates his expanded cellphone coverage for his commute home. "I get 2½ hours a week of increased productivity," says Reynolds, 37. That means more time with his three kids, because he doesn't have to make business calls at home.

Cellphone service has been creeping its way into rural America. The portion of the U.S. population with a choice of three or more wireless providers has grown to 96.8%, from 87.8% four years ago, FCC figures show. Mankato, Minn., for example, was served by just three carriers two years ago. Now, there are five. And outposts such as Parker, which had none, are abuzz with cellular service for the first time.

Partly fueling the growth are national carriers such as Verizon and Sprint that have expanded their networks to fill some coverage gaps, especially near major highways. In addition, a band of smaller companies such as Western, Alltel (which just announced a deal to buy Western), U.S. Cellular and Dobson Communications have ventured into even smaller towns.

Western has been most aggressive. As big carriers shunned the tiniest hamlets, Western was enticed by the lack of competition.

"I thought the need was great in rural areas," says Western Wireless CEO John Stanton. "I knew that if you bring the price down you dramatically expand the market."

Yet profits can be elusive. Western has spent $2 million in four years building towers to serve the Pine Ridge Indian Reservation in South Dakota, where just 10% of residents have land-line service. It has 4,000 customers but is still losing money. Western, which got $54 million in universal-service money last year, including about $1.2 million for Pine Ridge, is the largest wireless recipient.

Rural incumbents complain that wireless carriers use the money to pad their pockets in areas they already serve — not to bring fresh competition to underserved regions.

"They don't build out to every customer," says Tom Wacker of the National Telecommunications Cooperative Association. "They go to the most lucrative portions. They waltz in with a minimal investment and collect a mother lode."

Stanton disagrees, "We are covering areas we would not otherwise cover in places like Kansas, Nebraska, Utah and Nevada."

Some states, such as Montana, have rigorous standards, requiring carriers to build enough towers to serve an entire area. Western says that's burdensome. It notes that once it gets funding for a community, it must provide service to anyone in town who asks for it. Montana's rule has discouraged Western from using the funds there.

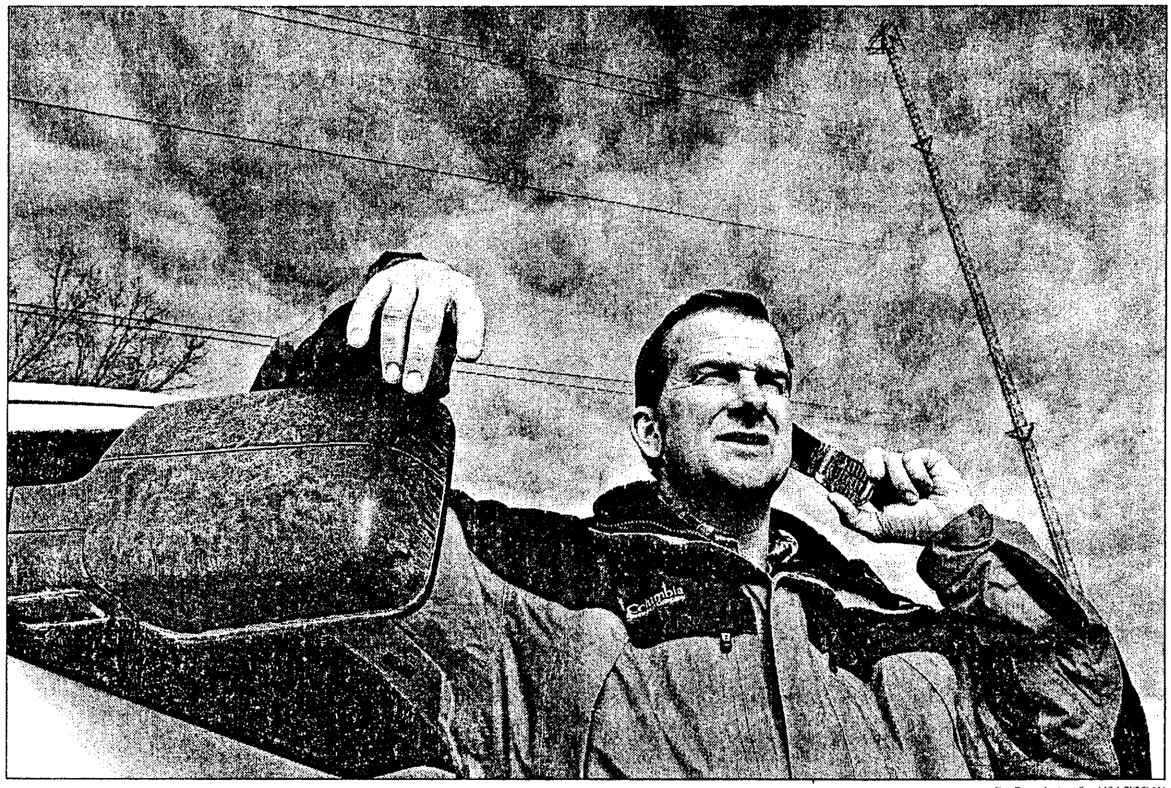
Rural companies also complain about the amount that wireless companies receive. For each customer they sign up, wireless providers get the same funding as the incumbent rural company. That's not fair, Wacker says. He notes that wireless companies generally have much lower costs because they don't have to string wires to each home.

Federal and state officials are eyeing ways to rein in the fund. A panel of regulators recommended that the FCC limit funding to the company that provides a customer's main phone line. That would kill much of the support for wireless carriers. But Congress, led by rural senators, last year passed legislation barring the FCC from making such a change.

Another panel recommendation — to pressure states to adopt stricter tower construction rules to improve coverage — could be approved by the FCC next month.

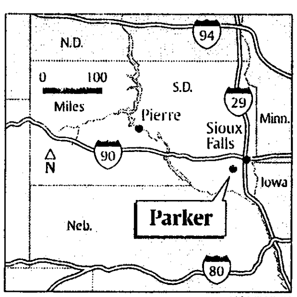
The panel is also weighing a proposal to base the payments to wireless carriers on their actual costs, rather than on the rural land-line company's costs.

Some states defend the current funding to rural wireless companies as a boon for public safety and economic development. "When people come to Main Street, flip open their cellphone and it doesn't work, they question whether this is where they want to move a corporation," says Bob Sahr, a member of the South Dakota Public Utilities Commission.



By Greg Latza for USA TODAY

Can you hear me now? Contractor Paul Reynolds uses his cellphone in Parker, S.D. Before December 2003, his phone was useless there. Then Western Wireless built a tower, background, near Parker.



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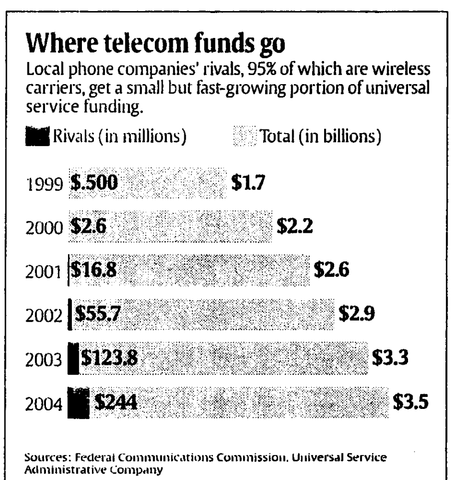

By Alejandro Gonzalez, USA TODAY